Supreme Court, U.S.
FILED
MAY 9 1994
OFFICE OF THE CLERK

No. 93-1539

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

---

from a Three Judge Panel
ited States District Court
stern District of Louisiana

APPE SPONSE TO THE BRIEF OF
TI STATES AMICUS CURIAE

KENNETH V
JAY P. LEFE
PAT A. CIPO
ROBERT GAS
KIRKLAND &
655 15th Str
Washington
(202) 879-5

PAUL LOY HURD
(Counsel of Record)
1101 Royal Avenue
P.O. Box 2190
Monroe, Louisiana 71241
(318) 323-3800

nsel for Appellees

WILSON - EF INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. THE GOVERNMENT'S BRIEF MISREPRESENTS THE HOLDING OF THE DISTRICT COURT	2
II. THE GOVERNMENT RELIES PRIMARILY ON ARGUMENTS REJECTED IN *SHAW*	4
III. LOUISIANA'S DISTRICTING PLAN IS NOT NARROWLY TAILORED	6
IV. SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S DECISION WILL AVOID UNCERTAINTY IN THE UPCOMING ELECTION	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Davis v. Bandemer, 478 U.S. 109 (1986) 8
Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) .. 8
Shaw v. Reno, 113 S.Ct. 2816 (1993) ..... *passim*
United Jewish Organizations of Williamsburgh, Inc. (UJO) v. Carey, 430 U.S. 144 (1977) 4, 5
Williams v. Rhodes, 393 U.S. 23 (1968) 8

CONSTITUTIONS

U.S. Const. amend. XIV (Equal Protection Clause) ..... *passim*

STATUTES

1992 La. Act 42 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1539

STATE OF LOUISIANA, *et al.*,
Appellants,

v.

RAY HAYS, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Western District of Louisiana

APPELLEES' RESPONSE TO THE BRIEF OF THE UNITED STATES AMICUS CURIAE

INTRODUCTION

A fair reading of the government's amicus curiae submission suggests this: the United States simply refuses to accede to *Shaw v. Reno*, 113 S.Ct. 2816 (1993). That is not all. Its result-oriented analysis features an unadmirable set of misrepresentations about the three-judge district court's holding, which faithfully applies *Shaw* to this case. The government's ill-founded arguments tell us much about the Justice Department's lack of admiration for *Shaw*, as well as its willingness to indulge in provocative advocacy, but these arguments do not at all illuminate the specific issue before this Court.

This case is about as bad as it gets; Louisiana has engaged in an egregious racial gerrymander without sufficient justification. The undisputed facts—in particular, the geography of District 4—place this case four-square

within the narrowest possible reading of *Shaw*. These facts permit only one conclusion: Louisiana's Congressional districting scheme is so wildly irregular and so provocatively unfaithful to traditional districting principles that it is precisely what it appears to be—an unjustified effort to segregate the races for voting purposes. *See Shaw*, 113 S.Ct. at 2824. As explained in detail in the district court's opinion and in Appellees' Motion To Affirm, Louisiana's Congressional districting scheme represents a stark, brazen racial gerrymander not narrowly tailored to serve any proffered state interest (even assuming, arguendo, that these proffered state motives rise to the level of "compelling interests").

In light of this flinty reality, the government provides no real response to the arguments set forth in Appellees' Motion To Affirm. Although most of the government's arguments have already been addressed and rejected by the district court, and by *Shaw* itself, Appellees submit this Response to reiterate why this Court should summarily affirm the district court's decision.

ARGUMENT

I. THE GOVERNMENT'S BRIEF MISREPRESENTS THE HOLDING OF THE DISTRICT COURT

Our first point is this: the government completely contorts the holding of the district court. Sadly, many of the same misrepresentations that riddled Appellants' Jurisdictional Statement have infected the government's submission as well. The following examples demonstrate this unfortunate and unflattering truth. The government claims "the district court held that Act 42 is subject to strict scrutiny *solely because race was a factor in its creation.*" Brief Amicus Curiae, at 9 (emphasis added). Another broadside: "[t]he district court adjudicated this case on the premise that a State's decision to create majority-minority districts, *without more*, requires strict scrutiny under the Equal Protection Clause." *Id.* (emphasis added). Still again, the government describes the district court's

holding this way: "the intentional creation of a majority-minority district is subject to strict equal protection scrutiny *regardless of the shape of the district* . . . . *Id.* at 11 (emphasis added). None of this is true.

First, the district court was confronted with a Congressional districting scheme so irregular on its face that it could only be explained as the product of racial gerrymandering. Thus, relying on *Shaw*, the district court merely reiterated that "racially gerrymandered redistricting plans are subject to the same strict scrutiny that applies to other state legislation classifying citizens on the basis of race[,]" and that such plans "violate the Equal Protection Clause of the Fourteenth Amendment unless they are narrowly tailored to further a compelling governmental interest." J.S. App. 13 (citing *Shaw*, at 2825, 2832). This Court has now seen the unprecedented, bizarre contours of District 4—the 600 mile long Z slashed across almost the entire State of Louisiana. As a Congressional district, it drives any unbiased observer armed with the undisputed facts of record ineluctably to one conclusion: racial gerrymandering.

Second, the district court *did not hold*, as the government would have it, that if race plays *any* factor in the drawing of districts, the Equal Protection Clause is violated. Nor did the court hold that majority-minority districts violate the Equal Protection Clause regardless of their shape. On the contrary, the district court specifically recognized a State's right to create majority-minority voting districts in certain circumstances. J.S. App. 4; Motion to Affirm, at 21. The district court further held—even putting aside the overwhelming direct evidence of racial gerrymandering—that the particular districting scheme at issue here is so extremely irregular that it could only be the product of racial gerrymandering. J.S. App. 43. The court thus concluded, after careful analysis, that the plan could not survive strict scrutiny because it was not narrowly tailored even to a presumptively compelling governmental interest.

To its credit, the government concedes that "*Shaw* recognized the 'analytically distinct' claim that a plan that departs from traditional redistricting criteria so substantially that *on its face* it rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race is subject to strict scrutiny." *Brief of Amicus Curiae*, at 11. But the government then tries to muddy the water by suggesting that strict scrutiny can be avoided if other "legitimate" factors, such as "protecting incumbents," affect in some way, however negligibly, the contours of the racially segregated districts. *Brief of Amicus Curiae*, at 15.

In the end, the government appears to retreat from this claim, saying only that "this case thus presents the question" whether such negligible influences can defeat application of strict scrutiny. *Brief of Amicus Curiae*, at 12. The government has good reason for being tentative. *Shaw*, at the very least, means that contorted district boundaries enclosing a racially skewed population, without more, create a presumption that strict scrutiny applies. The government's diffident suggestions that other factors may have played some minor role in shaping District 4 are insufficient to defeat this presumption.

II. THE GOVERNMENT RELIES PRIMARILY ON ARGUMENTS REJECTED IN *SHAW*

The government relies almost exclusively on *United Jewish Organizations of Williamsburgh, Inc. (UJO) v. Carey*, 430 U.S. 144 (1977). Indeed, its argument is drawn almost directly from the pages of Justice White's dissent in *Shaw*. But that battle was fought last Term, and the resolution reached in *Shaw's majority* opinion now controls. To understand why the government's never-say-die argument cannot prevail, the Court need only look to *Shaw* itself, which considered and rejected the same argument now warmed-over and served up again.

Shaw sets forth a lengthy analysis of *UJO* that directly and unequivocally contradicts the government's argument: "[N]othing in the Court's highly fractured decision in

UJO—on which the District Court almost exclusively relied, and which the dissenters evidently believe controls—forecloses the claim we recognize today." 113 S.Ct. at 2829. As this Court recognized, *UJO* did *not* involve the claim presented both in *Shaw* and here—a challenge to a districting plan that on its face is so highly irregular that it rationally can be understood only as an effort to segregate voters by race. *Id.* The distict court made clear that this case stated the identical claim recognized in *Shaw*:

> The narrow holding of *Shaw* is that a citizen states a claim under the Equal Protection Clause by alleging that the reapportionment scheme adopted by his state is so irrational on its face, so bizarrely shaped and convoluted, "that it can only be understood as an effort to segregate voters into separate voting districts because of their race . . . ." There is no question that the Plaintiffs make such allegations in their complaint.

J.S. App. at 7. Just as in *Shaw*, "*UJO*'s framework simply does not apply where, as here, a reapportionment plan is alleged to be so irrational on its face that it immediately offends principles of racial equality." *Shaw* 113 S.Ct. at 2829. This Court plainly recognized a distinction that the government refuses to accept:

> *UJO* set forth a standard under which white voters can establish unconstitutional vote dilution. But it did not purport to overrule *Gomillion* or *Wright*. Nothing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.

Id.

UJO does not control this case. *Shaw* does.

III. LOUISIANA'S DISTRICTING PLAN IS NOT NARROWLY TAILORED

The government contends that even if strict scrutiny applies, Louisiana's districting plan is "narrowly tailored" to serve a compelling governmental interest. The government thus disputes the district court's holding—which it made in reliance upon *Shaw* and other settled precedent—that Louisiana's plan is not narrowly tailored because: (i) it contains far more racial segregation than is reasonably necessary to serve the State's alleged compelling interests; and (ii) it grievously violates every traditional districting criterion, and far more so than necessary, even assuming the State's proffered interest in drawing a second majority-minority district is indeed compelling. The government offers two responses to the district court's holding. Neither is persuasive.

First, the Justice Department argues that a 63% minority population is "narrowly tailored." In supporting this contention, the government advances the same arguments made by the Appellants. We have addressed and rebutted these in the Motion To Affirm. Motion to Affirm, at 18-20. The Department's main mistake is its assumption that the district court established some sort of bright line population rule with respect to the "narrowly tailored" analysis. Conveniently, the government relies on this misinterpretation to argue that the district court must be incorrect because there have been other cases (in different circumstances) where districts with similar population levels have been upheld.

The district court, however, did just the opposite of what the government says it did. The district court established no bright line rules, but instead conducted the "narrowly tailored" analysis in the only way it can be done—on an individual basis given the particular facts of each case. The court looked at all of the circumstances of this districting scheme—including its extreme violations of every traditional districting principle—to determine that

it was not narrowly tailored. In its analysis, the court pointed out that a 63% minority population in District 4 seemed to be excessive, given the particular facts of *this* case, because the other majority-minority district in Louisiana's scheme had identical voting characteristics but required only a 54% minority population. Accordingly, in this case, 63% is excessive and well beyond the bounds of what is necessary.

This is also why the government's comparison to cases involving other districting plans is unavailing. It may be that in those cases, given all of the particular facts, the plans could be considered "narrowly" tailored. But simply isolating population percentages from cases and districting plans with vastly different features serves no real comparative purpose. Moreover, not only does the government improperly accuse the district court of establishing a bright line population rule to strike down the plan, but the government then immediately tries to establish its own bright line rule in order to uphold the plan. This is plainly wrong. The point is that the "narrowly tailored" standard requires a case-specific analysis. Here, the districting scheme is clearly excessive. Therefore, it violates the Equal Protection Clause.

Second, the government throws in the novel argument that Louisiana's segregated districts can be sustained on the basis of governmental interests that are not compelling, or even important, but are, more modestly, "legitimate." In its view, "a State should be free to weigh other *legitimate* interests in deciding where and how to draw [a segregated] district." Brief Amicus Curiae, at 15 (emphasis added). The proposition that racial segregation may be justified by "legitimate" interests mocks not only *Shaw*—which reaffirmed that strict scrutiny means a statute must be "narrowly tailored to further a *compelling* governmental interest," *Shaw*, 113 S.Ct. at 2816 (emphasis added) —but this Court's precedents generally. Indeed, Justices who have advocated relaxed scrutiny of "remedial" racial

classifications have still insisted that such classifications serve "*important* governmental objectives." *See, e.g., Richmand v. J.A. Croson, Co.*, 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (emphasis added). Giving weight under strict scrutiny to interests that are not compelling, nor even important, would effect a constitutional revolution that no Justice has advocated.

But even if the Court were inclined to overthrow precedent, this case provides poor ground indeed for staging such a revolution. The purported "legitimate" interest invoked by the United States on Act 42's behalf—so-called "protection of incumbents"—is little more than a euphemism for "interests" the Court has declared illegitimate under the Constitution itself. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 (1986) (allegation of "political gerrymandering" states a justiciable claim under the Equal Protection Clause); *Williams v. Rhodes*, 393 U.S. 23 (1968) (laws disenfranchising political newcomers can violate the Equal Protection Clause). Finally, as the district court concluded, this recently discovered state interest in "protection of incumbents" amounts to little more than post hoc rationalization.

In sum, Louisiana's racially gerrymandered plan is not narrowly tailored to any state interests, even assuming for the sake of argument that those interests are compelling. It therefore violates the Equal Protection Clause.

IV. SUMMARY AFFIRMANCE OF THE DISTRICT COURT'S DECISION WILL AVOID UNCERTAINTY IN THE UPCOMING ELECTION

The 1994 Congressional elections approach swiftly, and the deadlines associated with this election create added time pressure requiring immediate consideration of this case. The time for qualifying as a candidate for Representative ends on July 29, 1994—less than three months from now. The primary elections are scheduled for October 1, 1994. The sooner this Court rules, the sooner an accept-

able remedial districting plan can be adopted, approved, and implemented. The State's recent action in adopting a new plan suggests that the State is not presently anticipating further elections under the now-discredited plan invalidated by the district court; nonetheless, the State has not seen fit to withdraw this appeal challenging the demonstrably correct application of *Shaw* to this case. Under these circumstances, this Court's summary affirmance of the district court's decision would introduce a significant measure of certainty into a confused and complicated electoral situation.

CONCLUSION

The United States presents no new argument that counsels against summary affirmance. For the reasons previously stated, the district court's judgment should be summarily affirmed.

Respectfully submitted,

KENNETH W. STARR
JAY P. LEFKOWITZ
PAT A. CIPOLLONE
ROBERT GASAWAY
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000

PAUL LOY HURD
(Counsel of Record)
1101 Royal Avenue
P.O. Box 2190
Monroe, Louisiana 71241
(318) 323-3800

Counsel for Appellees